Petition

81-1492

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ALEXANDER L. STEVAS,
CLERK

No.:_____

IN THE

Supreme Court of the United States

October Term, 1981

STANDARD DRYWALL, INC.,
Petitioner,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD BURSTEIN,
On the Brief

Questions Presented

1. Whether this Court should grant the petition so that a conflict among the Circuit Courts of Appeals may be resolved?

2. Whether the Court of Appeals erred in dismissing, for lack of jurisdiction, petitioner's appeal from the district court's denial of a pre-indictment motion, pursuant to Rule 41(e) Fed.R.Cr.P., for return of property?

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No.:_____

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STANDARD DRYWALL, INC.,

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-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Standard Drywall respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 5, 1982, dismissing, for lack of jurisdiction, petitioner's appeal from the district court's denial of a pre-indictment motion for return of property.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit dismissing petitioner's appeal is as yet unreported and appears in the appendix hereto at pp. 1a-6a.

Jurisdiction

The decision of the Court of Appeals for the Second Circuit was filed on January 5, 1982. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

United States Code, Title 28;

§ 1291. Final decisions of district courts.

The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 18, Rules of Criminal Procedure;

Rule 41(e) **Motion for Return of Property.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Statement of the Case

On May 28, 1981, agents of the Federal Bureau of Investigation and the Internal Revenue Service entered the premises of Standard Drywall Corporation, a company engaged in the business of interior construction, and seized a large volume of corporate books and records. The agents were armed with a search warrant which particularized the documents subject to seizure. Despite the specificity in the warrant, though, they seized a substantial number of documents outside of its scope.

Following the seizure, Standard Drywall moved, pursuant to Rule 41(e), Federal Rules of Criminal Procedure, for a return of the property seized. The motion was three-pronged. First, it was argued that the contents of the affidavit submitted by the government in support of its application for a search warrant should be disclosed. Plaintiff argued that the clearly established right to bring a pre-indictment Rule 41(e) motion entailed that a movant be given the means necessary to pursue the litigation. Second, plaintiff claimed that he was entitled to return of those seized items that were not specified in the warrant. Last, it was urged that, at a minimum, plaintiff was entitled to an evidentiary hearing to determine the extent to which the government's seizures went beyond the warrant's authorization.

The government's response to plaintiff's request for disclosure of the affidavit was grounded upon an invocation of the need for Grand Jury secrecy.

> First, the affidavit recites a significant amount of Grand Jury evidence ...
>
> Second, the government's on-going year-long investigation would be palpably compromised and thwarted by revealing ... the contents of [special agent] Gabriel's detailed affidavit ...

Third, the affidavit contained specific information revealed to the FBI by several confidential informants.

As for the claim that some of the documents seized were not specified in the search warrant, the government simply stated that "[t]he prejudice to movants, if any, by delayed return to them of the original documents is outweighed by the Grand Jury's right to use the documents as evidence in its continuing investigation."* On the issue of the need for a hearing, the government's view was that such a proceeding would unduly compromise the Grand Jury's efficiency.

The lower court accepted the government's deification of Grand Jury secrecy without question. In regard to disclosure of the affidavit, it stated that "under those circumstances with an on-going investigation I'm not going to require it ...." As for the allegedly improper execution of the search warrant and the need for an evidentiary hearing, the court echoed the government's refrain: "[W]ith the Grand Jury at this time involved in this matter I'll not have any hearing in this court concerning this matter under any circumstances ... I would not allow a hearing which would interfere or disclose what might be occurring there." When counsel pointed out that a hearing into the execution of the search warrant did not require any discussion of Grand Jury proceedings, the court remained adamant: "At this point with a Grand Jury investigation pending I'm not going to have a hearing on anything."

Following the district court's denial of its motion, petitioner then appealed to United States Court of Appeals for the Second Circuit. This appeal was dismissed for lack of jurisdiction. The basis for the court's decision was its reading of *DiBella v. United States*, 369 U.S. 121, 131-32 (1962), where this Court ruled

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*The government relied heavily upon its offer to provide plaintiff with copies of the seized documents.

that the denial of a pre-indictment motion under Rule 41(e) is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." Recognizing that "[t]he Circuits have divided on the proper interpretation of *DiBella*", *see* p. 4a of appendix hereto, the Second Circuit sided with the view that a motion by one who is under Grand Jury investigation does not meet *DiBella*'s requirement that it be "in no way tied to a criminal prosecution." In so holding, the court focused upon three factors. First, it argued that pre-indictment Rule 41(e) motions by subjects of Grand Jury investigations are really disguised attempts at suppression of evidence,* especially where, as here, the government has offered to provide copies of seized documents. Second, focusing upon *United States v. Calandra*, 414 U.S. 338, 349-50 (1974), the Second Circuit noted that "allowance of an appeal from denial of the motion would interfere with grand jury proceedings ... and permit piecemeal appeals." Third, the court claimed that denial of jurisdiction did not harm petitioner:

> The term of the Grand Jury is limited. If its inquiry results in indictment, the lawfulness of the seizure will be fully considered upon a motion to suppress, and any ruling adverse to the defendant will be reviewed upon appeal from a final judgment; if the Grand Jury declines to indict the movant, or adjourns without indicting it, its property will most likely be returned, and if not, it can initiate an independent proceeding for its return.

See pp. 5a-6a of appendix hereto.

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*Where a Rule 41(e) motion is granted, the returned property "shall not be admissible in evidence at any hearing or trial."

Reasons for Granting the Writ

I.

The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Proper Interpretation of *DiBella v. United States.*

In construing *DiBella v. United States*, *supra*, as prohibiting an appeal from a denial of a Rule 41(e) motion where the movant is a subject of grand jury investigation, the court acknowledged that the circuits have divided over this question. Indeed, the First, Third, Fourth, Fifth, and Ninth Circuits, *see Imperial Distributors, Inc. v. United States*, 617 F.2d 892, 894-96 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *In re Grand Jury Proceedings (FMC Corporation)*, 604 F.2d 806, 807 (3rd Cir. 1979); *Parrish v. United States*, 376 F.2d 601, 603-04 (4th Cir. 1967) (concurring opinion); *Simons v. United States*, 592 F.2d 251, 252 (5th Cir.), *cert. denied*, 444 U.S. 835 (1979); *Church of Scientology of California v. United States*, 591 F.2d 533, 535-37 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), have sided with the Second Circuit. In contrast, the Sixth, Seventh, Eighth and Tenth Circuits, *see Coury v. United States*, 426 F.2d 1354, 1355 (6th Cir. 1970); *United States v. One Residence & Attached Garage, etc.*, 603 F.2d 1231, 1234 (7th Cir. 1979); *United States v. Alexander*, 428 F.2d 1169, 1171 (8th Cir. 1970); *Gottone v. United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965), have read *DiBella* as allowing an appeal so long as no formal criminal charges have been entered against the movant.

This conflict justifies the grant of certiorari to review the judgment below. U.S. Sup. Ct. Rule 19(1)(b), 28 U.S.C.

II.

The Decision Below Incorrectly Interpreted *DiBella* and Deprived Petitioner of Its Right to Appeal the District Court's Denial of Its Rule 41(e) Motion.

The extent of a Circuit Court of Appeal's jurisdiction to entertain an appeal from a denial of a pre-indictment Rule 41(e) motion for return of seized property revolves around this Court's intent when it stated:

> We hold, accordingly, that the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability ... Only if the motion is solely for return of property and is no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.

DiBella v. United States, *supra*, 369 U.S. at 131-32.

According to the Second Circuit, the existence of an ongoing grand jury investigation amounts to a "criminal prosecution *in esse*." Yet, the language of *DiBella* itself strongly suggests a different answer. There, immediately prior to stating its "criminal prosecution *in esse*" rule, this Court made clear that a prosecution must move from the investigatory to the accusatory stage before a Rule 41(e) appeal becomes interlocutory.

> When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or arraignment, information, or indictment - in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen v. United States*, 278 U.S. 221, 227, 49 S.Ct. 120.

360 U.S. at 131.

In *United States v. One Residence & Attached Garage, etc., supra*, 603 F.2d at 1235, Judge Swygert, in his concurring opinion, relied upon this same language in *DiBella* as a basis for the court's entertainment of an appeal of a denial of a pre-indictment motion:

> Accordingly, *because no criminal charges have yet been filed in the instant case, there is no prosecution in esse*; the criminal process is at best in the investigatory stage. *Id.* The *DiBella* opinion itself supports this determination.

(*Emphasis supplied*).

Beyond the language in *DiBella* there are other arguments which cast doubt upon the Second Circuit's decision. First, to define "criminal prosecution *in esse*" so that it encompasses the existence of an ongoing grand jury investigation accords the government far too much unsupervised power over seized property. Limiting the right to appeal in these matters results in the government being able to retain seized property for an indefinite period of time. Where a district court denies a motion for return of property, the subject of the search has no further remedy. A person may have to wait the whole eighteen-month life of a grand jury before regaining possession of his property. Such delays in relief are unconscionable where the district court errs in its assessment of the government's actions. This concern was raised in *United States v. Ryan*, 402 U.S. 530, 533 (1971), where it was noted that "denial of review in such circumstances would mean that the government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession."

Second, the willingness of the government to provide copies of seized documents is wholly irrelevant to the issue of appealability because the availability of copies in no way answers the question of whether or not there is a "criminal prosecution *in esse*." Further,

this focus signifies a misconception about the nature of a Rule 41(e) motion. Such motions are based upon the claim that the government has acted illegally in seizing a movant's property and therefore has absolutely no right to retain it. Simply stated, offering copies of illegally seized documents does not cure a Fourth Amendment violation by the government. On this theory, the government could improperly seize an original Rembrandt and avoid judicial scrutiny simply by offering a $15.00 copy of the painting.

The Sixth Circuit has considered this issue and implicitly concluded that a government offer to make copies of documents available does not prohibit an appeal of a denial of a Rule 41(e) motion. In *Consumer Credit Insurance Agency, Inc. v. United States*, 599 F.2d 770 (6th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980), the court expressed doubts about its jurisdiction over an appeal because the lower court had ordered the government to make copies of the documents but return the originals to the movants. In noting that "we conceive that an appeal aimed solely at the return of copies may lack requisite independence from the extant grand jury probe," 599 F.2d at 773, n. 2, the court stated its view that no jurisdictional difficulties arise where the government insists upon retaining the original documents seized.

Third, *United States v. Calandra*, *supra*, does not mandate a different result than the one urged here. *Calandra* is relevant only to the issue of whether illegally seized evidence can be entertained by the grand jury. Here, though, the issue is not whether the grand jury is entitled to consider the seized documents -- indeed it is -- but whether plaintiff may proceed with his clearly established right to gain return of illegally seized property. It must be remembered that the basis for this Court's decision in *Calandra* was its view of the exclusionary rule's limits. The court's holding that the rule did not apply in the grand jury was based

upon its conclusion that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. 348. *Calandra* makes clear that one does not have a constitutional right to the suppression of illegally seized evidence. In contrast, one surely does have such a right to the return of illegally seized property. *See United States v. One Residence & Attached Garage, supra*, 603 F.2d at 1233-34.

In any event, appeals from denials of pre-indictment motions for return of property do not really interfere with grand jury investigations, as the government may retain seized property and present it to the grand jury throughout the appellate process. Further, if the motion is granted, the remedy's bonus of suppression will help the grand jury avoid wasting energy and time on prosecutions which will ultimately fail for lack of admissible evidence.

As for the concern that motions for return of property are really suppression motions in disguise, it should be emphasized that two motions can be distinct from one another and yet still have the same ultimate result. The fact that a successful constitutionally-based motion for return of property entails the suppression of evidence does not mean that there is no difference between a motion for return of property and a motion for suppression. The collateral effects of a Rule 41(e) motion become relevant only if an indictment is ultimately returned. If a grand jury decides not to indict, and that decision may take 18 months to make, all congressionally mandated opportunity to litigate the validity of a questioned search and seizure will have been lost and the movant will have been deprived unfairly of his property for an extended period of time. Ultimately, this is the determinative consideration.

Conclusion

For the foregoing reasons, it is hereby respectfully submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Appendix

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 413—August Term, 1981
(Argued: November 17, 1981 Decided: January 5, 1982)
Docket No. 81-2261

STANDARD DRYWALL, INC.,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before:
TIMBERS, VAN GRAAFEILAND and NEWMAN,
Circuit Judges.

Appeal from an order of the District court for the Eastern District of New York (Henry Bramwell, Judge), denying a motion under Rule 41(e) of the Federal Rules of Criminal Procedure for the return of seized property.

Appeal dismissed for lack of appellate jurisdiction.

GERALD L. SHARGEL, New York, N.Y. (Judd Burstein, Law Clerk, New York, N.Y., on the brief), *for plaintiff-appellant.*

LAURA A. BREVETTI, Special Atty., Brooklyn, N.Y. (Edward R. Korman, U.S. Atty., Thomas P. Puccio, Brooklyn, N.Y. on the brief), *for the defendant-appellee.*

Appendix A
Opinion of United States Court of Appeals

NEWMAN, *Circuit Judge*:

This is an appeal from the denial of a motion under Rule 41(e) of the Federal Rules of Criminal Procedure, seeking return of property seized pursuant to a search warrant. Since we conclude that the order denying the motion is not appealable, we dismiss the appeal for lack of appellate jurisdiction.

On May 28, 1981, federal agents executed a warrant to search the offices of Standard Drywall, Inc. and seized various books and records for presentation to a grand jury that is investigating criminal violations allegedly committed by Standard Drywall and other companies in the construction industry in the New York metropolitan area. In support of the search warrant, a federal agent had submitted to the magistrate a detailed affidavit; upon the Government's request, the magistrate sealed the affidavit until further order of the court. On June 16, 1981, Standard Drywall filed a motion under Rule 41(e) for the return of all of its property seized pursuant to the search warrant, and also moved for disclosure of the affidavit supporting the warrant. The District Court for the Eastern District of New York (Henry Bramwell, Judge) denied Standard Drywall's Rule 41(e) motion.[1] Relying on *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F. Supp. 863, 866 (D. Minn. 1979), the Court held that Standard Drywall had failed to demonstrate that it would suffer irreparable harm if the documents seized were not

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[1]At a hearing, Judge Bramwell rejected Standard Drywall's request for disclosure of the sealed affidavit and reserved decision on the Rule 41(e) motion. The ensuing opinion therefore dealt only with the latter issue.

returned;[2] therefore, the Court stated, it need not balance any violation of Standard Drywall's Fourth Amendment rights against the need of the grand jury to consider all relevant evidence. In the absence of irreparable harm, the District Court has postponed consideration of the merits of appellant's Fourth Amendment claim until such time as the initiation of a criminal proceeding necessitates such consideration in connection with a motion to suppress, brought under Rule 12(b)(3); *see also* Rule 41(f). Standard Drywall appeals the denial of its motion.[3]

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[2]The Government offered to provide to Standard Drywall copies of all of the documents seized from its offices. The District Court stated that this offer undermined Standard Drywall's contention that it could not conduct business without these documents and refuted any claim of irreparable harm. We seriously question whether, in the absence of seizure of some unique property or privileged documents, a party could ever demonstrate irreparable harm when the Government either provides the party with copies of the items seized or returns the originals to the party and presents the copies to the jury.

[3]As docketed in this Court, the appeal bears the caption "The Offices of Standard Drywall, Inc. Located within the Ground Floor and Basement of a One Story Brick Building Known as 2202 Avenue X, Brooklyn, New York v. United States of America." That unwieldy designation derives from the caption of the search warrant. When Standard Drywall, Inc. filed its Rule 41(e) motion, no criminal case was pending. In such circumstances, the only proceeding in the District Court is the request of Standard Drywall, Inc. for relief from the United States, and the proceeding, both in the District Court and on appeal, should be captioned "Standard Drywall, Inc. v. United States of America." *See, e.g., Imperial Distributors, Inc. v. United States*, 617 F.2d 892 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980). Prior to *DiBella v. United States*, 369 U.S. 121 (1962), we viewed such proceedings as independent actions from which an appeal could be taken, *see Grant v. United States*, 282 F.2d 165, 168 (2d Cir. 1960). Of course, the caption does not determine whether the District Court's order is final for purposes of 28 U.S.C. § 1291 (1976); that determination, as we point out, *infra*, turns on a realistic application of the principles set forth in *DiBella*.

Appendix A
Opinion of United States Court of Appeals

In *DiBella v. United States*, 369 U.S. 121, 131-32 (1962), the Supreme Court ruled that the denial of a preindictment motion under Rule 41(e) is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." The Circuits have divided on the proper interpretation of *DiBella* in situations like the one before us where the movant seeking return of seized property has been neither indicted, arrested, nor otherwise had criminal proceedings formally instituted against him. Some courts have allowed appeals, usually emphasizing the absence of a pending criminal case. *United States v. One Residence & Attached Garage*, 603 F.2d 1231 (7th Cir. 1979); *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Coury v. United States*, 426 F.2d 1354 (6th Cir. 1970); *Gottone v. United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965). Other courts, however, have declined appellate jurisdiction, usually emphasizing that the pendency of grand jury or other investigative proceedings indicated that the motion was not solely for the return of property. *Imperial Distributors, Inc. v. United States*, 617 F.2d 892 (1st Cir.), *cert. denied*, 449 U.S. 891 (1980); *In re Grand Jury Proceedings*, 604 F.2d 806 (3d Cir. 1979) (*per curiam*); *Simons v. United States*, 592 F.2d 251 (5th Cir.) (*per curiam*), *cert. denied*, 444 U.S. 835 (1979); *Church of Scientology v. United States*, 591 F.2d 533 (9th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980); *see United States v. One Residence & Attached Garage, supra*, 603 F.2d at 1237-40 (Wood, J., dissenting).

The disagreement among the cases may stem in part from the fact that, by the explicit terms of Rule 41(e), if a motion for return of property is granted, the property "shall not be admissible in evidence at any hearing or trial." A movant can omit any reference to "suppression" in his motion for return of property, as this appellant has done, and claim to satisfy the *DiBella* test of appealability, secure in the knowledge that the

granting of his motion for return of property automatically results in suppression. The cases allowing appeal seem to assume that when a criminal proceeding is not formally in existence, a Rule 41(e) motion can be considered to be "solely" for the return of property, within the meaning of *DiBella*. The cases dismissing appeals have paid more heed, sometimes explicitly, *Imperial Distributors, Inc. v. United States, supra*, 617 F.2d at 895, to the automatic consequence of granting a Rule 41(e) motion and have focused on the reality of whether the purpose of the motion, however styled, is to keep seized evidence from a grand jury or other investigative agency.

We think the cases that have dismissed appeals by those under investigation, even in the absence of a pending criminal prosecution, have correctly applied the principles of *DiBella*. Where, as here, the party moving for return of seized property is the subject of a grand jury inquiry,[4] allowance of an appeal from denial of the motion would interfere with the grand jury proceedings, *see United States v. Calandra*, 414 U.S. 338, 349-50 (1974), and permit piecemeal appeals, *see Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Plainly this is not a case, of the sort contemplated in *United States v. Ryan*, 402 U.S. 530, 533 (1971), where denial of review "would mean that the Government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession." The term of the grand jury is limited. If its inquiry results in indictment, the lawfulness of the seizure will be fully considered upon a motion to suppress, and any ruling adverse to the defendant will be reviewable upon appeal from a final

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[4]Appellant does not dispute that it is a subject of the grand jury investigation, and we have independently satisfied ourselves on that score by inspecting the sealed affidavit.

judgment; if the grand jury declines to indict the movant, or adjourns without indicting it, its property will most likely be returned, and if not, it can initiate an independent proceeding for its return. *Cf. Dickhart v. United States*, 16 F.2d 345 (D.C. Cir. 1926) (motion for return of seized property after search warrant quashed and defendant discharged).[5] Under *DiBella* a prompt appeal would be available after denial of a motion for return of property brought by a movant with no connection to either an actual or potential criminal case, a person not suspected of anything who happened to have on his premises property pertinent to an investigation or prosecution of someone else; a motion by one in that situation would be solely for the return of property. Because the appellant is not within that category, the denial of its motion is not a final order.

Appeal dismissed.

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[5]In deferring review of DiBella's claim until appeal from a final judgment of conviction, the Supreme Court must have recognized the possibility that the interlocutory order denying return of seized property might never merge into a final judgment that DiBella could appeal; the complaint or a subsequent indictment might have been dismissed or DiBella might have been acquitted. The Court no doubt assumed that if the prosecution of DiBella were to terminate without a reviewable judgment of conviction, he would either have his property returned or then be in a position to claim its return and seek review of any order denying that claim. Appellant here would be in the same situation if the pending investigation does not result in a final judgment of conviction.

Opposition

Supreme Court, U.S.
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No. 81-1492

In the Supreme Court of the United States

OCTOBER TERM, 1981

STANDARD DRYWALL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the denial of petitioner's Fed. R. Crim. P. 41(e) motion for the return of seized property is appealable, where petitioner is the subject of an ongoing grand jury investigation, but formal criminal charges against it have not yet been brought.

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Rule 41(e) 2, 4, 5, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1492

STANDARD DRYWALL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1982. The petition for a writ of certiorari was filed on February 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 28, 1981, federal agents executed a search warrant at petitioner's offices and seized various books and records for presentation to a grand jury in the United States District Court for the Eastern District of New York. The grand jury is currently investigating criminal violations allegedly committed by petitioner and other companies in

the construction industry in the New York metropolitan area. In support of the search warrant, a federal agent submitted to the magistrate a detailed affidavit based on evidence received by the grand jury; upon the government's request, the magistrate sealed the affidavit until further order of the court. The government offered to provide petitioner with copies of all the documents seized from its offices (Pet. App. 2a-3a).

On June 16, 1981, petitioner filed a motion in the United States District Court for the Eastern District of New York under Fed. R. Crim. P. 41(e) for the return of all its property seized pursuant to the search warrant, and for the disclosure of the affidavit supporting the warrant. The district court denied the motion. It found that the government's offer to provide petitioner with copies of the seized documents undermined petitioner's contention that it could not conduct business and refuted any claim of irreparable harm. The district court therefore held that it need not balance any violation of petitioner's Fourth Amendment rights against the need of the grand jury to consider all relevant evidence. Since there was no irreparable harm, the court postponed considering the merits of petitioner's Fourth Amendment claim until the initiation of a criminal proceeding might necessitate such consideration in connection with a motion to suppress, brought under Fed. R. Crim. P. 12(b)(3). Pet. App. 2a-3a.

Petitioner appealed. Relying on *DiBella* v. *United States*, 369 U.S. 121 (1962), the court of appeals dismissed the appeal for lack of appellate jurisdiction (Pet. App. 1a-6a). *DiBella* held that the denial of a preindictment motion under Rule 41(e) is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." 369 U.S. at 131-132. The court of appeals here observed (Pet. App. 4a-5a) that, under Rule 41(e), if a motion for return of

property is granted, the property "shall not be admissible in evidence at any hearing or trial." Accordingly, the court reasoned (Pet. App. 5a) that where the movant is the subject of a grand jury inquiry, and where the effect of granting the motion would be to deprive the government of use of the property in any future criminal prosecution, the motion is not "solely" one for the return of property within the meaning of *DiBella*, but is also directed at the suppression of evidence. The court concluded (Pet. App. 6a) that, under *DiBella*, the movant is entitled to a prompt appeal only if the motion has "no connection to either an actual or potential criminal case * * *."

ARGUMENT

1. In *DiBella* v. *United States*, 369 U.S. 121 (1962), this Court held that an order denying a motion for the suppression and return of seized property is not appealable where an indictment intervenes between the filing of the motion and its disposition. The Court stated (*id.* at 131-132):

> Presentations before * * * a grand jury * * * are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention, or release on bail following arrest, or an arraignment, information, or indictment—in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." * * * Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.

In interpreting the directions of *DiBella* the courts of appeals have correctly focused on the twin requirements

that the movant be seeking only a return of the property and that criminal proceedings have not been initiated against the movant. Where, as in this case, a grand jury has been summoned, and the movant is a subject of the grand jury's investigation (Pet. App. 5a n.4), those criteria dictate that a denial of a Rule 41(e) motion is not appealable. That petitioner is a subject of the investigation means that it has an overriding interest in taking advantage of the Rule's prescription that property returned "shall not be admissible in evidence at any hearing or trial." Fed. R. Crim. P. 41(e). Indeed, the circumstances of this case suggest that this may be petitioner's only motive for making the motion: the government has offered to provide copies of all the documents seized, so there can be little merit to any contention that the failure to return them will impede the conduct of petitioner's business (Pet. App. 2a-3a).

Moreover, the fact that a grand jury has been summoned is similar to the kinds of objective signals mentioned by *DiBella* as evidence that criminal proceedings are under way at the time of the motion.[1] Once grand jury proceedings are begun, allowing appeals permits the piecemeal disposition of a cause which both unsettles "the distribution of authority within the judicial hierarchy," *Cobbledick* v. *United States*, 309 U.S. 323, 330 (1940), and imposes on the government the burden of conducting proceedings on two fronts simultaneously. Unlike a Rule 41(e) motion denied before the summoning of a grand jury or the initiation of other preliminary proceedings, the order which petitioner

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[1]Similarly, the phrase "criminal proceeding" in 18 U.S.C. 3731, which defines the government's right to appeal from suppression and exclusion orders, has been interpreted to include grand jury proceedings. See, *e.g.*, *In re Grand Jury Subpoena*, 646 F. 2d 963, 967 (5th Cir. 1981); *In re Grand Jury Empanelled February 14, 1978*, 597 F. 2d 851, 856-857 (3d Cir. 1979); *United States* v. *Calandra*, 455 F. 2d 750, 752 (6th Cir. 1972).

seeks to have reviewed may be considered on appeal together with other questions once the proceedings are concluded. This is not a case "where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). The grand jury's term is fixed in duration, Fed. R. Crim. P. 6(g); 18 U.S.C. 3331, and if an indictment is returned, trial must quickly follow. 18 U.S.C. 3161 *et seq.* The district court's ruling on the propriety of the seizure would then be reviewable after conviction. On the other hand, if the movant were acquitted, or if the grand jury is discharged without returning an indictment, the property would ordinarily be restored to the movant; if not, he could then press for return in the court of appeals.

Moreover, permitting appeal during the pendency of grand jury proceedings subjects the jurisdiction of the court of appeals to continuing uncertainty, since an indictment might be returned before the case could be decided on appeal. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 503, 533 (1971); *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cobbledick* v. *United States*, 309 U.S. 323, 325-326 (1940); *Application of the United States*, 427 F. 2d 1140, 1141 (5th Cir. 1970); *Parrish* v. *United States*, 376 F. 2d 601 (4th Cir. 1967). Finally, full litigation of a Rule 41(e) motion made while active investigation of suspected crimes is underway may be difficult without disclosure of details of the ongoing investigation that would gravely compromise the investigation or perhaps endanger persons cooperating with it. This is particularly true where the foundation for a search warrant is information drawn from the grand jury's proceedings, which it may not be possible to reveal to the movant until the grand jury is discharged. See Pet. App. 2a-3a, 5a; *Shea* v. *Gabriel*, 520 F. 2d 879, 880 (1st Cir. 1975). In this case, for example, petitioner's motion in the district court sought disclosure of a detailed affidavit, supporting the

warrant, that contained secret grand jury information released to an agent pursuant to Fed. R. Crim. P. 6(e). Pet. 3-4. The courts should not readily construe Rule 41(e) or associated appeal rights in a manner that allows motions for return of property to become instruments for obstruction of criminal investigations.[2]

The considerations governing appealability that were announced in *DiBella* make particular the inevitable balance that must be struck between the potential for disruption inherent in immediate appeals and the likely damage to the movant caused by delaying review of possible errors by the district court. Cf. *DiBella* v. *United States, supra,* 369 U.S. at 124, 129-132. In a case like this, which is already before a grand jury, where the harm to petitioner from the government's continued possession of the documents is minimal, where the marginal benefit of immediate review is uncertain, and where the disruption for the prosecution and within the judicial hierarchy is considerable, those considerations strongly counsel against appeal.

2. Petitioner contends that the courts of appeals are in conflict over the appealability of a denial of a Rule 41(e) motion. In fact, however, the courts have been generally consistent in recognizing that once a grand jury has been summoned, such a denial is not a final order appealable under 28 U.S.C. 1291. See *Imperial Distributors, Inc.* v. *United States,* 617 F. 2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980) ("We have been unable to find any cases holding that the denial of a suppression motion was appealable where there was an ongoing grand jury proceeding."); *In re Grand Jury Proceedings (FMC Corporation),* 604

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[2]Insofar as petitioner's motion challenges the execution of the warrant, rather than the fact of probable cause, it would not require disclosure of this information.

F. 2d 806, 807 (3d Cir. 1979); *Simons* v. *United States*, 592 F. 2d 251 (5th Cir.), cert. denied, 444 U.S. 835 (1979); *Church of Scientology of California* v. *United States*, 591 F. 2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *Shea* v. *Gabriel*, 520 F. 2d 879 (1st Cir. 1975). Cf. *Consumer Credit Insurance Agency, Inc.* v. *United States*, 599 F. 2d 770, 772-773 n.2 (6th Cir. 1979); *Smith* v. *United States*, 377 F. 2d 739 (3d Cir. 1967). On the other hand, those cases which petitioner claims disagree on the question of appealability have simply permitted appeals from unsuccessful Rule 41(e) motions in situations where no grand jury was sitting. *United States* v. *Alexander*, 428 F. 2d 1169 (8th Cir. 1970); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970); *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965).

The only case that has failed to treat the pendancy of a grand jury proceeding as dispositive is *United States* v. *One Residence & Attached Garage*, 603 F. 2d 1231 (7th Cir. 1979), where a divided panel of the Seventh Circuit held that a denial of a Rule 41(e) motion was appealable despite the fact that a grand jury was sitting. In that case, however, the court's justification for allowing an appeal was not that the grand jury proceedings did not signal a criminal proceeding against the movant, but rather that the property seized was "in no way tied to [the] criminal prosecution" and that the motion sought only return of the property. *DiBella* v. *United States, supra*, 369 U.S. at 132. The movant had sought the return of some $275,000 in cash taken from a safe in his house, and the only reason advanced by the government for the seizure was that the money might have afforded a motive for a burglary that had earlier occurred at the movant's house. See 603 F. 2d at 1234. The court explicitly noted that "the issue of suppression in the event of an indictment or criminal charge is not disposed of by these proceedings." *Ibid.* Given that narrow

and unexceptionable basis for the court's holding, the government decided not to seek en banc reconsideration or review in this Court of the Seventh Circuit's decision.

Petitioner is in no position to claim that it falls within the narrow circumference of the holding in *One Residence and Attached Garage*. As we noted above, the government has offered to provide copies of all the documents seized, and the relevance of the documents to the investigation of the grand jury is unquestioned. Under these circumstances, it is unclear whether the Seventh Circuit would allow an appeal, and there is accordingly no reason for this Court to review this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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